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THE UNDERMINING OF AN ANTITRUST BANK MERGER POLICY

PHILIP MARCUS*

BANK CONCENTRATION AND BANK MERGER HISTORY

BANK merger bills proposed in the 89th Congress¹ imposed an unusual strain on the legislative process. The progress of these bills was marked by an abrasiveness, a lobbying effort, and a compound of fervor and equivocation at both the executive and legislative levels, unmatched in many years.

There is an explanatory background for these bills. The background itself, however, is one which the law's reasonable man might find difficult to understand. Prior to the great depression of the thirties, there were more than twice the number of banks in this country than at present.² Because banks were a major casualty of that depression, many mergers resulted. Thus, in a number of instances mergers served to preserve both the assets of a bank as well as the accounts of its depositors.

The unlamented passage of the depression, however, was not accompanied by a similar disappearance of bank mergers. Numerically, it is unlikely that mergers in any other area of business equal those which resulted in the field of banking. For example, in the period 1950-1958, some 1,330 of the nation's commercial banks disappeared through mergers.³

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¹ S. 1698, H.R. 7563, 7591, 7718, 7952, 8096, 8388, 8448, 11011, 11033, 11669, 11697, 89th Cong., 1st Sess. (1965).

² See *Hearings on S. 1698 Before a Subcommittee of the Senate Committee on Banking and Currency*, 89th Cong., 1st Sess. 2021 (1965); STAFF OF SUBCOMM. NO. 5, HOUSE COMM. ON THE JUDICIARY, 82D CONG., 2D SESS. *BANK MERGERS AND CONCENTRATION OF BANKING FACILITIES* 7 (Comm. Print 1952). The high tide was reached in 1921, with over 30,000. In recent years the number has been around 13,500.

³ S. REP. NO. 196, 86th Cong., 1st Sess. 28, 46 (1959). Between 1945 and the end of 1951 more than 580 commercial banks disappeared by way of mergers and consolidations.

This pattern of merger history has been an important factor in the existing picture of bank concentration in the United States. Thus, by July, 1965, in the majority of sixty-five metropolitan areas, three commercial banks held over 75 per cent of the commercial bank deposits in each of such areas. At the end of 1964, ten commercial banks and bank groups had 21.8 per cent of the total deposits of commercial banks in the United States, and five such groups had 14.1 per cent. In addition, over one-half of the commercial deposits had been accumulated by 1 per cent of our nation's commercial banks.⁴ As of that time, in seven states, three banks held 75 per cent or more of all such deposits.⁵ Furthermore, in 1965, in the state of California eight banks were reported to have over 75 per cent of the banking offices and over 92 per cent of these deposits.⁶ As the chairman of the Hanover Bank noted, "All of the five largest banks in the . . . local, national and international markets have achieved their present position through important mergers."⁷ It is not surprising then, that at the end of 1964 there were about forty banks in the United States with resources of over \$1 billion.⁸

Prior to 1960, the federal regulatory agencies overseeing banks had approval and rejection powers over certain types of mergers, these powers being not unappreciable in number. Their record, however, was very questionable.⁹ A former Comptroller of the Currency, who stated that he would not approve a bank merger which was contrary

⁴ F.D.I.C. ANN. REP. 140-42 (1964). For other bank concentration figures, see also, S. REP. NO. 196, 86th Cong., 1st Sess. 27 (1959); HALL AND PHILLIPS, *BANK MERGERS AND THE REGULATORY AGENCIES* 13-14 (1964).

⁵ F.D.I.C. ANN. REP. 55 (1962). For discussions of the problem of bank concentration see Celler, *The Philadelphia National Bank Case: A Rejoinder*, 1 NAT. BANK. REV. 229 (1964); Shull and Horowitz, *Branch Banking and the Structure of Competition*, 1 NAT. BANK. REV. 301,330(1964); Lent, *The Changing Structure of Commercial Banking*, TUCK BULL. No 2413(1960).

⁶ *Hearings on S. 1698, supra* note 2, at 137, 181.

⁷ *United States v. Manufacturers Hanover Trust Co.*, 240 F. Supp. 867,943 (S.D. N.Y. 1965).

⁸ RAND McNALLY, *INTERNATIONAL BANKERS DIRECTORY* 78 (1965 Ed.). There were 34 such banks with deposits of over \$1 billion. In comparison, at the end of 1951, there were 18 banks in that category. STAFF OF SUBCOMM. NO. 5, *supra* note 2, at 53. See also, STAFF OF HOUSE SELECT COMM. ON SMALL BUSINESS, 86th Cong., 2d Sess., *BANKING CONCENTRATION AND SMALL BUSINESS* 38 (Comm. Print 1960).

⁹ See *Supplemental Views*, in S. REP. NO. 196, 86th Cong., 1st Sess. 25-6 (1959).

to the principles of Section 7 of the Clayton Act,¹⁰ nonetheless, failed to disapprove a single merger on these grounds from 1950 to 1955¹¹ Nor, as of that latter date had any merger been refused by the Federal Reserve Board.¹² Even as late as 1960, the Board had disapproved only one merger because of competitive factors. From 1950 to 1958, the Comptroller approved 731 mergers, while, during the same period, competitive considerations formed the basis for only 23 disapprovals.¹³ The record of state regulatory agencies with respect to merger applications revealed a comparable reluctance to halt mergers in the banking field.¹⁴

In 1955, Stanley N. Barnes, head of the Antitrust Division of the Department of Justice, put the banking fraternity on notice that the Department was duly concerned over the high rate of mergers and resulting bank concentration. He specifically noted that the government was investigating mergers in New York City, as well as in Philadelphia.¹⁵

By 1960, Congressional concern over the number of bank mergers,¹⁶ resulted in the institution of two different approaches to the problem.

¹⁰ 15 U.S.C. § 18 (1958).

¹¹ INTERIM REPORT OF THE ANTITRUST SUBCOMM. OF THE HOUSE COMM. ON THE JUDICIARY, ON CORPORATE AND BANK MERGERS, 84TH CONG., 1ST SESS. 36 (1955). See also S. REP. No. 196, *supra* note 3, at 26.

¹² *Hearings on Current Antitrust Problems Before Antitrust Subcommittee of the House Committee on the Judiciary*, Pt. 111, 84th Cong., 1st Sess. 2159 (1955). The Chairman of the Board testified that, "[s]ince 1933, the merger movement has been the major factor in the gradual decline in the total number of banks."

¹³ S. REP. No. 196, 86th Cong., 1st Sess. 25 (1959).

¹⁴ See S. REP. No. 196, *supra* note 3, at 10, 15, 16. Generally, where state banking authorities pass upon bank merger applications, a denial by such authority effectively stops the proposed merger. If approval is given, however, the federal banking agencies must still pass upon the proposed merger.

¹⁵ Address by Stanley N. Barnes, Chicago, Illinois Sept. 26, 1955. But the Barnes regime was unproductive with respect to the filing of bank merger suits. In that same year Federal Reserve Board members had expressed concern over the merger trend in the banking field. See *Hearings on Current Antitrust Problems*, *supra* note 12, at 2165. As we have seen, however, the bank regulatory agencies had done little to stem that trend. During the years 1934-59, some 3,177 banks were absorbed by other banks. *Hearings on S. 1698*, *supra* note 2, at 22. Other interesting statistics on bank mergers in early periods are found in S. REP. No. 196, *supra* note 3, at 10 (1959); STAFF OF BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM TO SENATE SMALL BUSINESS COMMITTEE, RECENT DEVELOPMENTS IN THE STRUCTURE OF BANKING, 87TH CONG., 2D SESS. (1962).

¹⁶ There was also concern over the record of the federal banking agencies. See S. REP. No. 196 *supra* note 3, at 25.

One proposal, which met with little success, was to amend Section 7 of the Clayton Act¹⁷ to specifically include banks within its purview.¹⁸ Others suggested enacting special legislation respecting bank mergers. This second approach was more successful; from it came the Bank Merger Act of 1960.¹⁹

The Act made three important contributions. First, it established statutory standards for the federal banking regulatory agencies to employ in passing bank merger applications.²⁰ These standards, however, had been used to some extent in the past by those same agencies. Secondly, it greatly enlarged the types of mergers which were required to receive approval by the regulatory agencies before they could be consummated. And, thirdly, it required the agency with which the application was filed, to request reports on the competitive aspects of the proposed merger from both the Attorney General and the other two federal banking agencies.²¹

No brave new world resulted from this piece of legislation. To illustrate, whereas in the period 1957-1959, mergers absorbed 472 banks with assets of \$7.8 billion, in the post Act period of 1961-1963, a total of 477 banks containing assets of \$11.7 billion similarly disappeared.²² Furthermore, it was reported in Congress that from May 13, 1960 to December 31, 1964, 715 banks with resources of \$15.7 billion were absorbed by other banks.²³

Between the date of passage of the Bank Merger Act and May 7, 1965, the Comptroller of the Currency received 477 merger applica-

¹⁷ 15 U.S.C. § 18 (1958).

¹⁸ In 1955 the Federal Reserve Board favored giving the Attorney General exclusive jurisdiction for enforcement of the Clayton Act as to banks. *Hearings Before Antitrust Subcommittee of House Committee on the Judiciary on H.R. 5948*, 84th Cong., 1st Sess. 50 (1955). As to the attitude of the federal bank regulatory agencies on bank merger legislation prior to 1960, see *infra* note 52.

¹⁹ 12 U.S.C. § 1828(c) (1958).

²⁰ Those standards are: a. financial history and condition of each bank; b. adequacy of capital structure; c. future earnings prospects; d. general character of its management; e. whether its corporate powers are consistent with the purpose of the Act; f. the convenience and needs of the community to be served; g. effect on competition (including any tendency toward monopoly).

²¹ The Comptroller of the Currency has authority over bank merger applications where the resulting bank is to be a national or District of Columbia bank. The jurisdiction of the Federal Reserve Board attaches if the resulting bank is to be a state member bank; and the Federal Deposit Corporation acts on bank merger proposals where the resulting bank is to be a non-member insured bank (except a District bank).

²² *Hearings on S. 1698*, *supra* note 2, at 152.

²³ *Ibid.*

tions. Approval followed in 450 cases. Only twelve applications were denied.²⁴ From May 13, 1960 to April 30, 1965, the Federal Deposit Insurance Corporation approved 172 applications and refused a mere two.²⁵ The Federal Reserve Board, during the same period, denied only seventeen of 141 such requests.²⁶

The mergers thus approved were not confined to combinations of strong banks with weak ones, or of large with small. On the contrary, they included mergers of very large financial institutions with ones of similar size.²⁷

In 1955, a report from the House Subcommittee on the Judiciary asserted that, "In recent years a rising tide of industrial and bank mergers has played a significant role in hastening the reduction of competition in many areas and promoting the concentration of economic power."²⁸ A decade later a spokesman for the Independent Bankers Association commented:

We started out ten years ago viewing the rapid trend to concentration with great alarm. Now we can only view the scene with greater alarm because the trend has not only continued but has increased in intensity.²⁹

Over a long period of time, the law in its equal majesty ignored both large and small bank mergers. There was considerable doubt as to whether Section 7 of the Clayton Act applied to mergers which

²⁴ *Id.* at 17.

²⁵ *Id.* at 18.

²⁶ *Id.* at 17. As of August, 1965, the score was 147-17. *Hearings Before Subcommittee on Domestic Finance of House Committee on Banking and Currency on S. 1698*, 89th Cong., 1st Sess. 15 (1965).

²⁷ Thus, of the seven cases brought by the Attorney General against bank mergers since 1961, one involved the second and third largest banks in Philadelphia; another involved the second and sixth largest banks in Chicago; in a third the fifth and sixth largest banks in California merged; in a fourth the fifth and eighth largest banks in the New York City metropolitan area were the merging parties. Still another involved the first and fourth largest banks in Lexington, Kentucky; a sixth sought to prevent the merger of the second and fourth largest banks in Nashville, Tennessee, while the seventh involved the first and fifth largest banks in St. Louis. As to large scale bank mergers, see also STAFF OF BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM TO SENATE SMALL BUSINESS COMMITTEE, RECENT DEVELOPMENTS IN THE STRUCTURE OF BANKING, 87th Cong., 2d Sess. 8,13,22-29 (1962).

²⁸ INTERIM REPORT ON CORPORATE AND BANK MERGERS, 84th Cong., 1st Sess. 1 (1955).

²⁹ *Hearings on S. 1698*, *supra* note 2, at 51. It has been pointed out that in the decade, 1950-60, the number of commercial banks in the United States declined by 714, despite the chartering of 887 new banks during that period. That same period saw 1,503 banks with resources of well over \$25 billion disappear as the result of mergers. *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 325-6 (1963). In 1949, the 100 largest commercial banks had 42.8% of all commercial bank assets; at the end of 1964 they held 48.05%. *Hearings on Domestic Finance*, *supra* note 26, at 313.

were consummated by the acquisition of assets.⁸⁰ There was considerable certainty and publicity, however, as to the application of the Sherman Act.⁸¹ And, there is a good deal of evidence to suggest that the Bank Merger Act of 1960⁸² was not designed to affect the question of the applicability of the antitrust laws to bank mergers.⁸³

Although prior to 1961, the Department of Justice evidenced considerable reluctance in attempting to apply the antitrust laws to bank mergers, it did not leave this field entirely unploughed.⁸⁴ After the

⁸⁰ S. REP. NO. 196, 86th Cong., 1st Sess. 1 (1959); H.R. REP. NO. 1497, 84th Cong., 1st Sess. 1-2 (1955); STAFF OF SUBCOMM. NO. 5, HOUSE COMM. ON THE JUDICIARY, 82 CONG. 2D SESS., BANK MERGERS AND CONCENTRATION OF BANKING FACILITIES 25, 48 (Comm. Print 1952).

⁸¹ See S. REP. NO. 196, *supra* note 30, at 1, 3. In 1955, the head of the Antitrust Division of the Department of Justice testified that, "In the more than 60 years since the Sherman Act's passage no one has suggested its provisions did not apply to banks as to all other sectors of American business." *Hearings Before Antitrust Subcommittee of the House Committee on the Judiciary on H.R. 5948*, 84th Cong., 1st Sess. 11 (1955). Later that same year he made a similar statement in an address before the American Bankers Association in Chicago. Address, *The Antitrust Division Looks At Bank Mergers*, Sept. 26, 1955. Some four years later these views expressed by Stanley M. Barnes were repeated by Attorney General Brownell. See *Hearings Before Senate Committee on Banking and Currency on S. 1062*, 86th Cong., 1st Sess. 12 (1959).

⁸² 12 U.S.C.A. 1828(c) (Cum. Supp. 1965).

⁸³ The Chairman of the Senate Banking and Currency Committee, in 1959, asserted that, "The Committee did not recommend that bank mergers should be exempted from the Sherman Act." 105 CONG. REC. 8076 (1959). Later on in the same debate on the Bank Merger Act of 1960 he made similar assertions. See 105 CONG. REC. 8131 (1959). And Senator Javits made the unchallenged statement that, "The legislative history is now very clear that the bill which is before the Senate does not deprive the Attorney General of jurisdiction either under the Clayton Act or under the Sherman Act." 105 CONG. REC. 8133 (1959). Similar comments were made in the House debate. 106 CONG. REC. 7259 (1960). See also, STAFF OF SUBCOMMITTEE NO. 5 OF HOUSE COMM. ON THE JUDICIARY, BANK MERGERS AND CONCENTRATION OF BANKING FACILITIES, 82D CONG. 2D SESS. vii (Comm. Print 1952).

The Federal Reserve Board appears not to have doubted its power under Section 11 of the Clayton Act to use Section 7 of that Act, but it has shown no eagerness to do so. Its right to exercise such power has been questioned. See Herman, *The Philadelphia Bank Merger Decision and Its Critics*, 1 NAT. BANK REV. 391, note 3 (1964).

The report of the Senate Banking and Currency Committee on the Bank Holding Company Act contained the statement that "the Clayton Act has been judicially determined to apply to banks." S. REP. NO. 1095, 84th Cong., 1st Sess. 19 (1954). More recently, the Federal Reserve Board noted that, "The Bank Merger Act contains no specific exemption from the antitrust laws for bank mergers, and the legislative history of the Act indicates that this was not an inadvertence." *Hearings on S. 1698*, *supra* note 2, at 8.

⁸⁴ In 1959 the Government had sued under both Section 7 of the Clayton Act and under the Sherman Act to block the acquisition of the California Bank by First America. That case was settled in 1960. *United States v. First America Corporation*, Civil 38139 (N. D. Cal.). This case was referred to in the debate on the Bank Merger

passage of the Bank Merger Act, the Attorney General suffered the irritation of having the recommendations he had made to the bank regulatory agencies almost uniformly ignored. Perhaps this served to explain why, in 1961, we witnessed a spurt of activity against mergers on behalf of the Justice Department.

In that year, the Department commenced an action under the Sherman and Clayton Acts to prevent a bank merger in Philadelphia. In the case of *United States v. Philadelphia National Bank*,³⁵ the Comptroller of the Currency had approved a proposed merger of the second and third largest commercial banks in that city. The approval had been met with strong objections from the Attorney General, and was also in conflict with anti-competitive reports from the other regulatory agencies. The Comptroller upbraided the Department for bringing the suit, but both he and the banking fraternity appeared to have confidence that the courts would give the Justice Department its comeuppance. Though the trial court did provide the banks with a sweeping victory,³⁶ just as sweeping was the reversal in the United States Supreme Court, which held Section 7 of the Clayton Act applicable to the merger.³⁷

During the same year another merger occurred which was to have more fateful consequences. Manufacturers Trust Company, a \$3.9 billion institution, sought to acquire the Hanover Bank, which had assets of \$1.7 billion. This proposed merger of major New York City banks, though denounced by the Attorney General, was approved by the Federal Reserve Board by a vote of four to two. Unlike the situation which prevailed in the *Philadelphia* case, where the merger had not been consummated pending the suit, the New York banks, with apparent knowledge of the government's intention to challenge the proposed merger, completed it less than an hour before the action

Act of 1960. At least one other proposed bank merger was abandoned in 1959 because of threatened action on the part of the Department of Justice. See Address of Robert A. Bicks, *The Enforcement Policies of the Department of Justice and the Small Businessman*, ABA, *Section of Antitrust Law, Symposium on Small Business and the Antitrust Laws*, April 8, 1960. Even earlier the Federal Reserve Board had invoked the antitrust laws in a bank acquisition case. *Transamerica Corp. v. Board of Govs. of Fed. Res. Sys.*, 206 F.2d 163 (3d Cir. 1953).

³⁵ 201 F. Supp. 348 (E.D.Pa. 1962).

³⁶ *Ibid.*

³⁷ *United States v. Philadelphia Nat. Bank*, 374 U.S. 321 (1963). Pennsylvania, during the period 1962-65, had more bank mergers than any other state in the union, 92. See *Hearings on S. 1698*, *supra* note 2, at 241.

was filed.³⁸ The government failed to obtain either a restraining order or a temporary injunction; partially because of assurances from bank representatives that if the merger was declared invalid, it would not be difficult to return to the status quo.

The spotlight remained on the judiciary when, in 1964, the Supreme Court held that Section 1 of the Sherman Act was applicable to a merger in Lexington, Kentucky.³⁹ The following year, a Federal District Court sitting in New York City ruled that the Manufacturers-Hanover combination had violated the antitrust laws.⁴⁰ With the rendering of those opinions by the judiciary the focus of attention oscillated between the executive and legislative branches. The greater influence of the latter was to become apparent.

ATTEMPTS TO REMOVE BANK MERGERS FROM ANTITRUST LAWS

The passage of the Bank Merger Act of 1960 did not move the Congress to display any great interest in overseeing its operation.⁴¹ Though the Supreme Court's application of the Clayton Act to bank mergers came as a surprise to many, Congress evidenced no appreciable interest in enacting new legislation in this field.⁴² The invalidation of

³⁸ Possibly because of this beat-the-gun merger, the Board in November, 1961, adopted a rule under which a proposed merger coming before it cannot be consummated, except in special situations, until seven days have elapsed after public release of the Board's action approving the transaction. 12 C.F.R. 262.2(f) (5).

³⁹ *United States v. First Nat. Bank*, 376 U.S. 665 (1964).

⁴⁰ *United States v. Manufacturers Hanover Trust Co.*, 240 F. Supp. 867 (S.D.N.Y. 1965). Manufacturers had been involved in over 70 acquisitions and mergers in the period 1905-51. See STAFF OF SUBCOMMITTEE NO. 5 OF HOUSE COMM. ON THE JUDICIARY, *BANK MERGERS AND CONCENTRATION OF BANKING FACILITIES*, 82D CONG., 2D SESS. 23 (1952).

In the *Manufacturers Hanover* case, *supra* at 943, 948 the court noted that in New York City, a handful of large banks controlled a disproportionately large share of the local market. In 1950 there were 70 independent commercial banks in New York City. In the next decade 27 banks were absorbed by mergers and only three newcomers entered that market. As of June 30, 1964, the five largest banks in the metropolitan New York City area had 70.8% of the assets of commercial banks in that area, as well as 70.2% of the deposits and 71.1% of the loans. In addition the court found that 80.7% of the branch banking offices in New York City were concentrated into the hands of the five largest banks. As a result of bank mergers, as of September, 1963, since 1950, bank customers had lost 44 percent of independent banking alternatives.

⁴¹ But Congressman Emanuel Celler, Chairman of the House Committee on the Judiciary and of its Antitrust Subcommittee, for some years after the passage of the Bank Merger Act of 1960, actively opposed a number of proposed bank mergers in the metropolitan New York City area.

⁴² The Chairman of the Senate Banking and Currency Committee denounced the court's decision but did not call for new legislation. See *Hearings on S. 1698, Supra* note 2, at 36.

the Manufacturers Trust-Hanover merger, however, aroused a strong reaction in the banking fraternity and a consequent stirring of interest in the Congress.⁴³ There, strong voices were raised to condemn both the courts, for their application of the antitrust laws, and the Justice Department, for bringing bank merger actions. The locale of those suits included the four largest cities in the nation.

Senator Robertson, Chairman of the Banking and Currency Committee, promptly introduced a bill⁴⁴ which proposed not only to remove bank mergers from the scope of the antitrust laws, but sought the cancellation of all the pending bank merger litigation as well. During the four days of subcommittee hearings the great preponderance of the witnesses were supporters of the bill, with only representatives of several independent bankers' associations appearing in opposition. The hearings concluded without the Attorney General ever having been heard.

Senator Proxmire, a member of the Committee, then proposed an amendment to the Robertson bill, under which the Attorney General was empowered to invoke the antitrust laws against mergers approved by a federal bank regulatory agency, but only if the suit were commenced within thirty days after the agency's approval. Under certain circumstances even less time was allowed.⁴⁵ Perhaps unintentionally, S. 1698, as reported out of the Committee, also deprived private plaintiffs of the majority of the rights afforded them by the antitrust laws with respect to bank mergers.⁴⁶ The bill, which amounted to little more than special privilege legislation, would have exempted from the antitrust laws those mergers effected and approved prior to its enactment. This was a direct attack upon the pending merger suits.

⁴³ Said Congressman Wright Patman: "When they stepped on the toes of the nation's fourth largest bank, the roar from Wall Street was heard in every Congressional District." 111 CONG. REC., Appendix A 5914 (daily ed. Oct. 21, 1965).

⁴⁴ S. 1698, 89th Cong., 1st Sess. (1965).

⁴⁵ The proposed merger was not to be consummated until 30 days after approval, except in an emergency where a delay of 5 days would suffice.

⁴⁶ The thirty (or five day) statute of limitations would effectively bar most private suits. Under the wording of the bill it would seem that one would have to sue for injunctive relief even if he were interested only in a damage suit, and if he lost out on injunctive relief he could not maintain his damage action. Nor could a private plaintiff be sure of having the benefit of Section 5 of the Clayton Act even when the Government sued unless he himself filed suit within 30 days after merger approval by a banking agency. This is so because if the government suit was terminated without an order prohibiting the merger, and the merger was consummated, the private plaintiff would seem to be without relief.

When Chairman Robertson's bill reached the floor of the Senate, only Senators Hart and Robert Kennedy spoke in opposition. It passed the Senate without a dissenting vote.⁴⁷

In the House it was a different story since Chairman of the Banking and Currency Committee was Wright Patman. By word and by act, he had made the banking industry generally aware that he was not friendly toward mergers and the resulting concentration. Not infrequently, he had been a caustic critic of the bank regulatory agencies, and for a while it seemed as though Congressman Patman was going to sit on S. 1698 and companion house bills until the end of the session. But, members of his committee forced him to commence hearings before a subcommittee.⁴⁸

Unlike the Senate hearings, those conducted in the House had numerous witnesses and elicited a wide range of opinion. This applied to the supporters of the bill as well as to the opposition. Up to this time, the proponents had enjoyed considerable success in utilizing avenues of public expression. The extended House hearings, however, provided a forum for the opposition, thus providing considerable criticism from those committee members who had desired a quick reporting out of a bill in order that relief might be forthcoming to the banks involved in pending antitrust litigation.

These hearings, coupled with their aftermath, gave rise to disclosures and events of a most bizarre character. Thus, a special antitrust subcommittee of the American Bar Association was subjected to unusual pressure from members of some of the law firms representing the defendant banks in the pending merger suits, to refrain from bringing in a report. The report which finally was made by that subcommittee was somewhat vague, and, as of the close of the 89th Congress, had not been presented to the parent body for its consideration and action on any of the proposed bills.⁴⁹

Conspicuously present at the House hearings was the Attorney General.⁵⁰ There had been considerable speculation as to what position he

⁴⁷ See 111 CONG. REC. 12555 (daily ed., Jun. 11, 1965).

⁴⁸ See 111 CONG. REC. 27595 (daily ed., Oct. 22, 1965).

⁴⁹ See *Hearings on Domestic Finance*, *supra* note 26, at 993, 1769.

⁵⁰ Conspicuously absent was the Chairman of the House Antitrust Subcommittee of the Committee on the Judiciary. When the bank merger bill reached the House, after evolving from the Banking and Currency Committee, he supported it with a mild objection to an intervention provision.

would take because of the intense pressure in support of both the Senate bill and other pro-bank merger proposals. But, during his appearance before the House subcommittee he made a resounding attack upon the Senate bill.⁵¹

The executive branch of the federal government, however, showed a breach in the famed brand of Johnsonian consensus at this point. In prior years, the bank regulatory agencies had expressed a desire to have the antitrust laws made applicable to bank mergers to the extent that they did not then apply.⁵² But now, the heads of these same agencies testified in support of the Senate bill.⁵³ Though some members of the Federal Reserve Board expressed doubts as to certain features of the bill,⁵⁴ the Comptroller of the Currency advocated the removal of banks from the purview of the antitrust laws to an even greater degree than S. 1698 provided.⁵⁵

Seizing upon the Attorney General's testimony, Congressman Patman proclaimed that the views of the Attorney General were those of the Administration. From the bank regulatory agencies came heated denials. From the White House came embarrassed silence.

A number of congressmen had introduced bank merger bills,⁵⁶ and considerable support was afforded the so-called "Ashley Bill."⁵⁷ This bill, sponsored by Congressman Ashley of Ohio, provided that the standards of the Bank Merger Act of 1960 would apply both in an agency proceeding and in the event of judicial review. Factual findings of the agency would be conclusive if supported by substantial evidence. This, in effect, removed bank mergers from the antitrust laws, and was thus more far-reaching than the bill which had passed the

⁵¹ See *Hearings on Domestic Finance*, *supra* note 26, at 169.

⁵² See *Hearings on S. 1698*, *supra* note 2, at 329, 336-337, 347; *Hearings Before the Antitrust Committee of the House Committee on the Judiciary, Current Antitrust Problems*, Pt. 111, 84th Cong., 1st Sess. 2173, 2180 (1955); H. R. REP. NO. 1417, 84th Cong., 1st Sess. 4 (1955); INTERIM REPORT OF THE ANTITRUST SUBCOMMITTEE OF THE HOUSE COMMITTEE ON THE JUDICIARY, ON CORPORATE AND BANK MERGERS, 84TH CONG., 1ST SESS. 33 (1955).

⁵³ See *Hearings on Domestic Finance*, *supra* note 26, at 648, 801.

⁵⁴ *Id.* at 301-302, 381, 466.

⁵⁵ *Id.* at 732. Supporting his belief see 200, 204; but *c.f.* 707, 744-745, 801-802, 806, 809.

⁵⁶ *Supra* note 1.

⁵⁷ H.R. 11011. 89th Cong., 1st Sess. (1965).

Senate. In addition, the Ashley bill established an escape clause for all prior bank mergers.⁵⁸

Despite the pressures directed at him for quick action, Chairman Patman continued to employ Fabian tactics while at the same time compiling an impressive record of testimony at the hearings. Since there was strong support for a bill within his own committee, he was forced to call an executive session to consider what action might be required.⁵⁹ A new factor then arose which delighted the pro-merger adherents and dismayed the opponents. Consensus was on the move again.

Reversing the role of the lion in the Wizard of Oz, the Attorney General, in September, 1965, sent a letter to Chairman Patman. Mr. Katzenbach had recanted.⁶⁰ With a few qualifications, the most important of which was an objection to dropping any of the pending merger cases, he endorsed the Ashley bill. In his letter the Attorney General referred to conferences had with the Secretary of the Treasury. Following this correspondence, the Secretary of the Treasury, who was the Comptroller of the Currency's superior, wrote to Congressman Moorhead endorsing the Ashley bill.⁶¹

While this maneuvering was in force, a subcommittee of the House Banking and Currency Committee approved a proposal advanced by Congressman Weltner.⁶² Under this proposal, a regulatory agency could not approve a merger unless it found that such transaction would not violate the antitrust laws. In addition, a proposed merger would be

⁵⁸ The Chairman of the Senate Banking and Currency Committee made it known that the Ashley Bill was acceptable to him. 111 CONG. REC. 26697 (daily ed., Oct. 20, 1965).

⁵⁹ See 111 CONG. REC. 27595 (daily ed., Oct. 22, 1965).

⁶⁰ "Katzenbach Retreat" was the headline of a Wall Street Journal story. Wall Street Journal, Sept. 30, 1965, p. 4. The letter had the Journal's approval. Wall Street Journal, Oct. 8, 1965, p. 16. This item is set out in H. R. REP. NO. 1179, 89th Cong., 1st Sess. 6-8. (1965).

⁶¹ See H. R. REP. NO. 1179, 89th Cong., 1st Sess. 9 (1965). It may be noted that one of his predecessors had thought it all right for the Attorney General to enforce the antitrust laws with respect to bank mergers. *Hearings Before Antitrust Subcommittee of House Committee on the Judiciary on H. R. 5948*, 84th Cong., 1st Sess. 8, 11 (1955).

The Chairman of the House Judiciary Committee has asserted that bills to amend Section 7 of the Clayton Act to expressly include banks had the approval of the President in 1956, 1957, 1958 and 1959. See *Hearings Before Senate Committee on Banking and Currency on S. 1062*, 86th Cong., 1st Sess. 9 (1959).

⁶² The proposal as adopted by the subcommittee does not appear to have been put in bill form.

required to meet standards similar to those prescribed in the Bank Merger Act of 1960.⁶³ The bill further expressly provided that the consummation of a merger after commencement of an anti-merger suit would not preclude divestiture relief by order of the court.

The Attorney General, showing signs of indecision, then asked to be heard again. His request was denied by a 17-16 vote.⁶⁴

Meanwhile, strange things were happening within the House Banking and Currency Committee. Breaking a tradition of the House, Chairman Patman held public meetings of executive sessions of the Committee while it considered the various merger bills. Except to entertain the public, these sessions accomplished little. Whether private sessions would have accomplished more is doubtful.

A lull followed which was caused in part by the departure of Mr. Patman to his native Texas. Then, an angry exchange of letters between Congressman Ashley and Chairman Patman ensued which evoked much fire and shed little light.⁶⁵ At the request of his committee members, Chairman Patman scheduled a meeting for October 18, 1965. Although this meeting was intended to produce a decisive vote, instead it produced a chaotic ending.⁶⁶

The Ashley forces seemingly acknowledged defeat.⁶⁷ Then apparently through cloak and dagger tactics,⁶⁸ they rallied to produce a

⁶³ This proposal would have given all bank mergers effected prior to June 17, 1963 the benefit of a conclusive presumption that they had not violated the antitrust laws.

⁶⁴ See *American Banker* 1, 13 (Oct. 11, 1965).

⁶⁵ Shortly before adjournment of Congress, Ashley had written to Patman that, "Time after time parliamentary procedure has been flaunted, the wishes of a majority of the committee thwarted, and every dilatory and obstructionist tactic at your command resorted to in your efforts to prevent the committee from exercising its will on bank merger legislation prior to the adjournment of Congress." To which Patman replied: "Is the rush because Manufacturers Hanover Trust Co. of New York . . . is facing a divestiture order . . . ? The banks have spent more money on these bills than any other banking legislation in the history of Congress." *Wash. Post*, Oct. 17, 1965, p. 2. For attempts by members of the Committee to curtail the hearings, see *Hearings on Domestic Finance*, *supra* note 26, at 392, 394-95, 397.

⁶⁶ At the opening of the October 18 Committee session, the Ashley forces were unable to muster a quorum when the chairman called for a roll call, Mr. Patman then called off the meeting. See *American Banker*, Oct. 19, 1965, p. 1.

⁶⁷ See *American Banker*, Oct. 20, 1965, p. 1.

⁶⁸ A reasonably accurate account of a very confused affair is as follows: A committee rule, which had not been used for many years, required the committee to meet every first and third Tuesday of the month unless cancelled by the chairman. On October 18, 1965, a Monday, the chairman had given a letter to the clerk of the committee. In that letter he had stated that the committee would not meet on the 19th, and that since

runaway committee action which approved the Ashley bill. The legality of this maneuver, however, was strongly challenged.⁶⁹ As reported out, the Ashley bill differed from its original form, but it still provided bank mergers with a large measure of protection from the antitrust laws.⁷⁰

The first session of the 89th Congress expired amidst recriminatory charges between Chairman Patman and some of his committee members,⁷¹ but without action having been taken on the Ashley bill.⁷² Veterans of many congressional wars could not remember a donnybrook of this sort.⁷³ The last day of the session was more climactic than anticlimactic in its contribution to this controversy. On that day five senators, including the majority and minority leaders, Mansfield and Dirksen, sent a letter to the Attorney General asking him, with respect to the six pending merger cases, "to refrain from any further steps in these cases"⁷⁴ until Congress could act upon bank merger legislation at

it was customary to notify members only when a meeting was scheduled it was not necessary for the clerk to notify the members that the meeting was cancelled.

On the morning of the 19th, while Congressman Patman was attending his wife at a hospital, Congressman Moorhead came into the anteroom of the committee room. The main entrance of the latter opening onto a corridor was kept locked when not in use. The Congressman advised a secretary that he desired to get something out of his desk. She went into the committee room with him, turned on the lights and went back to her office. Shortly thereafter noise arose in the committee room. Going there she found that a number of members of the committee had been let in through the main door.

One Patman supporter came and promptly left calling the meeting illegal. Congressman Reuss as senior member took the chair and declared the meeting to be illegal but was overruled by the Ashley forces which then approved the Ashley bill. At some point Chairman Patman dashed in, impounded the minutes and asserted the meeting was illegal. But Mr. Ashley received permission from the Speaker of the House to file a "committee report," which Mr. Patman promptly labeled as illegal. On this affair, see *American Banker*, Oct. 20, 1965; *Washington Post*, Oct. 20, 1965, p. D6; Nov. 1, 1965, p. B1; 111 CONG. REC. 26754, 26848, 27594 (daily ed. Oct. 20, 21, 22, 1965).

⁶⁹ See 111 CONG. REC. 26754, 27575 (daily ed. Oct. 20, 22, 1965).

⁷⁰ The Ashley bill apparently was acceptable to the Chairman of the Senate Committee on Banking and Currency. *American Banker*, Oct. 21, 1965, p. 9.

⁷¹ Much of this controversy was public, some was not.

⁷² Since this was the first session of the 89th Congress the status quo was preserved for the second session.

⁷³ The *Wall Street Journal* called the committee fight, "one of the worst blow ups in an important House Committee in the memory of Capitol Hill old timers." *Wall Street Journal*, Oct. 22, 1965, p. 5.

⁷⁴ The letter also asked that the Attorney General bring the Senators' views to the attention of the courts having cognizance of the pending bank merger cases.

its next session. This communication evoked a searing response from Congressman Patman.⁷⁵ Though divestiture decrees apparently had been worked out at this time, no final decree had been entered nor had any of the pending cases been terminated.⁷⁶

At the beginning of the second session of the 89th Congress, the Attorney General wrote another letter respecting a bank merger bill.⁷⁷ This communication was directed to Congressman Reuss, who had authored a bill toward the close of the previous session.⁷⁸ The Attorney General proposed certain revisions in the Ashley bill. Referring to his letter of September 24, 1965, to Chairman Patman, Mr. Katzenbach observed that "the proposed revision clarifies some of the possible ambiguities that that letter may have contained." Again, however, he sought to have his cake and eat it, but at the same time acknowledged the difficulty in such endeavor.⁷⁹ He attempted to justify his willingness to accept standards used under the Bank Merger Act of 1960 as controlling upon the courts, contending that those standards were similar to the tests applied under the antitrust laws.⁸⁰ That point of view, however, does not appear to have been advanced by members of Congress engaged in this controversy. Such attempted amalgamation of a competitive test with the Bank Merger Act standards, in the opinion of this writer, would not only serve to rob the antitrust test of independent and controlling significance, but would also create a test of

⁷⁵ He referred to the Senators' letter as "an obvious outright, blatant attempt to pressure both the judicial and executive branches of Government." Both letters appear in the Congressional Record for October 22, 1965.

⁷⁶ Understandably the banks involved have not pressed to have a divestiture decree entered. While the other two banking agencies appear to have cooperated in facilitating the working out of divestiture decrees, this does not appear to be true of the Comptroller of the Currency. See *Hearings on Domestic Finance*, *supra* note 26, at 687, 688.

⁷⁷ See *Wall Street Journal*, Jan. 7, 1966, p. 2. The letter referred to conversations Congressman Reuss had had with members of the Attorney General's staff concerning proposals offered by Congressmen Reuss, Ashley and Ottinger.

⁷⁸ H.R. 11669 89th Cong., 1st Sess. (1965).

⁷⁹ He stated, "I should like to repeat here my strong belief that the differences, if any, in the standards applied to bank mergers by the courts, and the standards applied by the agencies have been overstated. . . . The analysis in your letter of October 20, 1965, illustrates, however, that it has been very difficult to draft statutory language creating uniform standards without also modifying existing law in undesirable ways."

⁸⁰ If the tests were so similar, it would seem that the large number of instances in which the Attorney General differed with the bank regulatory agencies as to particular mergers would be accountable by a large scale misapprehension of the test, either by the Attorney General or by the bank regulatory agencies.

considerable vagueness which would be difficult to apply. In the absence of a background of decided cases, it would amount to open-end invitation to large scale litigation.⁸¹

Despite the Attorney General's letter it soon became apparent that consensus had never quite jelled in the executive branch.⁸² The Comptroller of the Currency added to a long list of non-private communications his letter of January 10, 1966, directed to Congressman Reuss. In it he attacked the Attorney General's proposals, and proffered some of his own. It was returned by the Congressman with a scathing reply.⁸³ Congressman Reuss also received correspondence from the Secretary of the Treasury, who after admitting his inability to arrive at a consensus, advised that he favored the application of the standards enumerated in the Bank Merger Act.

The *coup de grace* to the anti-merger forces in Chairman Patman's Committee came on January 19, 1966. The previous evening, Speaker McCormack had held a conference with key members of the committee. At its meeting the next day a modified version of the Ashley bill was presented. It was met with a proposed amendment by Congressman Weltner to strike out a provision that would permit mergers violative of the antitrust laws. Upon defeat of this proposal by a somewhat narrow margin, the Ashley bill was quickly adopted by the committee with only two adverse votes.⁸⁴ Mr. Patman, who voted for the bill, indicated his surrender by agreeing to sponsor it in the House,⁸⁵ and the bill as it was reported out of the committee bore his name.⁸⁶

That bill, quickly enacted into law,⁸⁷ prohibits an agency from ap-

⁸¹ Standards such as those prescribed in this bill and in the Bank Merger Act of 1960. See *supra* note 19. These, however, are not of the type used by the Antitrust Division of the Department of Justice. For that very reason, any statute requiring attention to such tests might make it less likely that the Department would challenge bank mergers than is now true. It may be noted that when the Antitrust Division found itself in a proceeding to determine reasonable royalties under an antitrust judgment, its discomfort in this action led to a boilerplate provision in patent licensing antitrust consent judgments under which that issue is left for the prospective licensor and licensee to contest.

⁸² This was made clear in each of the letters to Congressman Reuss.

⁸³ Letter of January 12, 1966.

⁸⁴ See *Wall Street Journal*, Jan. 20, 1966, p. 2; *Washington Post*, Jan. 20, 1966, p. 29. Congressmen Todd and Weltner were the only ones to vote against the bill.

⁸⁵ H.R. 12173 89th Cong., 2d Sess. (1966).

⁸⁶ *Ibid.*

⁸⁷ P.L. 89-485 (June 1, 1966). Passed by the House on February 8, 1966; by the Senate on the following day; and signed by the President on February 21st.

proving a proposed merger which would result in a monopoly.⁸⁸ It requires a banking agency to consider, in connection with bank merger applications, Sherman and Clayton Act antitrust tests, but such standards could be disregarded in the event the agency thought the public interest so required in meeting the convenience and needs of the community to be served. In its consideration, the banking agency is directed to take cognizance of criteria similar to those established under the Bank Merger Act of 1960.⁸⁹

The new law provides that merger consummation must wait until thirty days after merger approval; save, that in the event of an emergency, the merger could be accomplished within five days. Any antitrust action to challenge the transaction would have to be commenced within the above time limits, and the court would be held to apply the same standards as required of the banking agencies. This enactment also served to wash out three of the pending merger cases including those in which antitrust violations had already been declared. As to the remaining three cases, the antitrust tests will not be applied; the tests embodied in the new law are to be substituted in their stead.

Public Law 89-656 not only provides for intervention by federal bank regulatory agencies in suits brought by the Attorney General, but also provides for intervention on behalf of state supervisory agencies as well.⁹⁰ It has, however, the same vagueness as the Ashley bill.⁹¹

Though the new law represents a compromise, it is heavily weighted

⁸⁸ The statute states: "(5) The responsible agency shall not approve—

"(A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize the business of banking in any part of the United States."

⁸⁹ *Supra* note 19. The Act states: "(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served."

⁹⁰ The Department of Justice might thus find itself confronted with three opponents. While the new law makes it difficult for any private suitor to attack a merger approved by one of the regulatory agencies, that law does not provide for intervention in such cases.

⁹¹ See *supra* note 78. See also Wall Street Journal, Jan. 19, 1966, p. 12.

in favor of the pro-merger forces.⁹² Mergers are not to be subject to the antitrust laws except pursuant to Section 2 of the Sherman Act.⁹³ The agencies must consider a competitive test along with other factors, but this was purportedly done in the past, though almost always a disagreement resulted with the Department of Justice as to the competitive implications of a proposed merger. Nonetheless, the agencies readily found the merger to be in the public interest in spite of anti-competitive aspects of the proposal.⁹⁴

It is ironic that the bill passed by the Senate in 1965, which would have preserved application of the antitrust laws to bank mergers, was opposed in the House for its otherwise objectionable features, only to be supplanted in the House by a bill which removed both past and future mergers from the antitrust laws. Even more ironic is the fact that nearly all of the witnesses who appeared before the House Banking and Currency Committee supported the antitrust provisions of S. 1698.⁹⁵

In presenting the bill to the House, Congressman Patman made some effort to provide a legislative history which would minimize the changes it wrought. This effort was somewhat diluted by remarks of other members of his committee.⁹⁶ On the Senate side, however, the Chairman of the Banking and Currency Committee went to extraordinary lengths to clothe the bill with a legislative history by his statement which emphasized the change.⁹⁷

⁹² It is not without significance that the big banks were more clearly for this legislation than other banks. See 112 CONG. REC. 578 (daily ed., Feb. 8, 1966).

⁹³ 15 U.S.C. § 2 (1963).

⁹⁴ See *Hearings on S. 1698*, *supra* note 2, at 50-51; *Hearings on Domestic Finance*, *supra* note 26, at 3, 38-39, 108, 520-521.

⁹⁵ From a reading of the hearings on the House side, it could be argued, perhaps, that no hearings were held on the bill reported out of the Committee on Banking and Currency.

⁹⁶ 112 CONG. REC. 2333-60 (daily ed., Feb. 8, 1966). Further dilution may be found in the report of the House Banking and Currency Committee, H. R. REP. NO. 1221, 89th Cong., 2d Sess. (1966). It is not uncommon when a bill is poorly drafted and its sponsor believes it is the only bill he can get through, or when he does not want to make the effort to change it, for the sponsor to present it with the statement which puts, or attempts to put, a gloss on the bill different from that which is derived from a literal reading of the language employed. Such attempts are often unsuccessful and usually lead to extensive litigation.

⁹⁷ It is not often that the Congress finds it necessary or desirable to reverse a decision of the Supreme Court. It is necessary and desirable in this instance because the consequences of the Court's erroneous opinions and decisions are so serious and because

In this history of a sustained attack upon the merger laws⁹⁸ one may deplore or extol the attitude of the Administration depending upon one's views respecting the antitrust laws. It does seem likely though, that an antitrust minded administration, a strong antitrust oriented Attorney General, and active aid to Congressman Patman from the Chairman of the House Judiciary might have produced a different result. From history we turn to rationale.

ANALYSIS OF THE ARGUMENTS IN OPPOSITION TO APPLICATION OF ANTITRUST

Three main arguments have been advanced in support of the probank bills. First, it is contended that banks are unique and have already been subjected to extensive government regulation. Therefore, it is said, the antitrust laws should not be applied to the banking industry, or, at least banks should be treated as a special case.⁹⁹ There is nothing so suspect in antitrust law as the cry of "uniqueness." It is not unusual when the antitrust laws are sought to be applied to an industry or to its leaders that a protective coat of uniqueness is claimed to avoid application of such laws. It is fairly common for industry members who

the error is so clear. The legislative history of this specific repeal of two Supreme Court decisions and one district court decision, and the clearer and more specific standards set forth in this bill, should convince the courts that the Congress does not intend that mergers in the banking field should be measured solely by the antitrust considerations which are applied in other industries. The banking agencies and the courts, in other words, are not intended and are not permitted to select some single, perhaps minor aspect of the banks' business and to say that, because there is some lessening of competition in this element of the business, the overall effects of the merger—the increase of competition in the entire field of banking and in the broader field of financial institutions which may result from other aspects of the merger—are irrelevant and may not be considered. 112 CONG. REC. 2538, 2541 (daily ed., Feb. 9, 1966).

⁹⁸ For an account of this history, see Large, *The Bank Merger Bill's Zany Journey*, Wall Street Journal, Feb. 8, 1966, p. 16.

⁹⁹ *Banking Is a Special Case*, editorial in the American Banker, Aug. 27, 1965, p. 4. See also, the assertion of the President of the American Banking Association, *Hearings on S. 1698*, *supra* note 2, at 62–63; Views of the Comptroller of the Currency, *Hearings on Domestic Finance*, *supra* note 26, at 730. In a letter of January 10, 1966 to Congressman Reuss, the Comptroller described a proposal of the Attorney General as an "effort to apply a traditional concept of competition developed for unregulated industry; a concept which is anachronistic and totally inapposite to the banking industry." In 1959, Attorney General Brownell, in testifying on the bill which became the Bank Merger Act of 1960, asserted, "Even more basically, however, I would argue against the wisdom of tailoring Section 7's strictures to the essentially unique needs of the banking industry." *Hearings Before the Senate Committee on Banking and Currency on S. 1065*, 86th Cong., 1st Sess. 12 (1959).

will be adversely affected to cry out that these laws may be good for others, but not for them.

Uniqueness, of course, is a characteristic of an industry and its identification. But, if this argument gained acceptance—and such is not likely¹⁰⁰—all industries might just as well be exempt from the application of the antitrust laws. Nor has this theory of uniqueness or of “special industry” by any means received the unanimous support of the banking industry.¹⁰¹

There are important aspects of banking such as interest rates and service charges which are either not regulated or subject to very loose regulation. But the fact that the banking industry is subject to some regulation and supervision¹⁰² has not prevented the widespread recognition of the need for and the importance of competition in this area.¹⁰³ So impressive is the argument for competition in the industry that one could well admit that banking is unique and therefore should

¹⁰⁰ One Congressman was of the opinion that the existence of the House Banking and Currency Committee itself indicated that banking was unique. *Hearings on Domestic Finance*, *supra* note 26, at 198.

¹⁰¹ *Hearings on S. 1698*, *supra* note 2, at 175. The President of the Independent Bankers Association of America asserted, “We are aware of the contention that banking is a specialized industry which requires specialized treatment under the antitrust laws. We cannot agree with that. . . . We still have competition as the primary regulator in banking. See also, *Hearings on Domestic Finance*, *supra* note 26, at 420. And, the Attorney General has stated, “I can see no difference between banks and other businesses as far as the antitrust laws are concerned.” *Hearings on Domestic Finance*, *supra* note 26, at 198, 609.

¹⁰² The antitrust laws have been applied to a number of regulated industries. See *Hearings on Domestic Finance*, *supra* note 26, at 781.

¹⁰³ See Comment, *Bank Charter, Branching, Holding Company and Merger Laws: Competition Frustrated*, 71 YALE L. J. 502, 530 *et seq.* (1962); Moore, *The Philadelphia Girard Decision: Some Further Comments*, 1 NAT. BANK REV. 407, 412–15 (1964).

“Vigorous competition between strong, aggressive, and sound banks is highly desirable; lack of competition, restraints on competition, and monopolistic practices are undesirable. . . . Vigorous competition in banking stimulates competition in the entire economy, in industry, commerce, and trade.” S. REP. NO. 196, 86th Cong., 1st Sess. 16 (1959). Similar comments appear in the companion report of the House Committee on Banking and Currency in the following year, and in the earlier, INTERIM REPORT OF THE ANTITRUST SUBCOMMITTEE OF THE HOUSE COMM. ON THE JUDICIARY, 84TH CONG., 1ST. SESS. 28 (1955). A strong statement on this point in the Philadelphia National Bank case was referred to several times in the recent hearings. *Hearings on Domestic Finance*, *supra* note 26, at 259, 324.

Governor Robertson of the Federal Reserve Board has made the classic statement: “It is my view that despite superficial differences between banking markets and those for other goods and services the market mechanism and the decisions made in the market place ordinarily can and should be relied upon to protect the interests and needs of individual communities and the general welfare of the country. . . . In short, it seems to me that what might be described as ‘pro-competitive’ policy toward bank-

be protected from the harsh competitive climate by application of the antitrust laws.

The second argument advanced is that the antitrust laws were not intended, or, at least so understood, to be applied to the banking industry. This canard was pressed in the 89th Congress even by persons who should have known better.¹⁰⁴ In light of the evidence to the

ing would produce more, better, and cheaper banking services for the public than a policy of shelter and sanctuary. . . .

Only two basic objections can be raised against making competition the appropriate policy goal for our monetary system. . . . The second is that banking, because of the need for safety and liquidity in the monetary system, must be supplemented by such extensive regulation that competition cannot operate even though the structure of the industry is conducive to competition. Put another way, the argument is that competition in the absence of regulation would cause extensive bank failures and seriously damage the public interest. . . .

It is important, I think, to be very clear about the nature of the conflict between a pro-competitive policy and bank safety. If we mean by bank safety the safeguarding of the stockholders' equity then this conflict is present. Competition among banks, like competition among drug stores and lumber mills, does risk stockholders' equity. This however, is the essence of an enterprise system where the entrepreneur is literally a 'riskier of capital.' If, on the other hand, we take bank safety to mean *depositor safety*, then competition is *not* inconsistent with bank safety. The depositor can be, and in most circumstances is, insulated from bank failure through the capital cushion and insurance." See MITCHELL, PERSPECTIVES ON ANTITRUST POLICY, MERGERS AMONG COMMERCIAL BANKS 236-38 (1965).

For other advocacy of competition in banking, see *Hearings on Domestic Finance*, *supra* note 26, at 474, 928-29, 948 *et seq.*

In *New Jersey Bank and Trust Co.*, 51 FED. RESERVE BULL. 1269 (1965). The majority of the Governors of the Federal Reserve System justified approval of a merger on the ground that the acquired bank was not very energetic. But a two member dissent pointed out that, "State bank offers more attractive rates to individual customers both with respect to interest on savings deposits and charges on checking accounts than Jersey Bank does; this is competition . . . *some* competition is far greater than *none*." *Id.* at 1272. That bank customers may be unhappy with particular banks, see *Hearings on Domestic Finance*, *supra* note 26, at 1729 *et seq.*

¹⁰⁴ Thus the Chief Counsel of the Senate Committee on Banking and Currency has said: "The fact is that Congress never intended the Sherman Act or the 1950 Celler-Kefauver antimerger Act to apply to banking or to bank mergers." Hale, *Mergers of Financial Institutions*, 21 BUS. LAW. 211 (1965). The President of the American Bankers Association made a similar assertion. *Hearings on S. 1698*, *supra* note 2, at 61. That the Association had been advised to the contrary. See *supra* note 30. Senator Proxmire, in his testimony before the House Banking and Currency Committee, stated that, "Assistant Attorney General Bicks made the statement in 1959 that the Department would not bring suit against banks because they were clearly exempt under the antitrust laws." *Hearings on Domestic Finance*, *supra* note 26, at 498-99. The Senator's recollection may be faulty. At any rate, in April, 1960, Mr. Bicks in a speech in which he referred to activities of the Department of Justice in the bank field, specifically noted that in October, 1959, the Antitrust Division had advised certain New Haven banks that their proposed merger would violate the Sherman Act and that the Department was prepared to take steps to stop the merger. Address of Robert A. Bicks, April 8, 1960 before Section of Antitrust Laws of American Bar Association.

contrary adduced elsewhere in this article,¹⁰⁵ this argument is clearly fallacious. Moreover, as to the six banks involved in merger litigation, there exists highly probative evidence that the banks had been put on notice that antitrust actions in all likelihood would be commenced in the event the mergers were consummated.¹⁰⁶

The final argument concerns the chaos and difficulties allegedly inherent in divestiture decrees. Chaos is the God to whom many an antitrust defendant renders homage. "How can the scrambled egg be unscrambled?" we are asked, especially when the scrambled egg is a big bank merger. We are asked to sympathize with the depositors and borrowers who might have to make a choice in the event of a divestiture. This sort of reasoning is but one step away from an apology that the antitrust laws should not be applied to a company because it is too big. For the bigger they are, the harder they fall.

Though arguments of this nature have received much support both in and out of Congress, it is submitted that it will not stand analysis. The argument ignores the harm suffered by the public through the elimination or substantial lessening of competition. Further, in complete opposition to the courts, it ignores completely the proposition that such harm is of a continuing nature as long as the merger remains in force.¹⁰⁷ Again, those who voice concern over the alleged hardship accruing to depositors and borrowers of a merged bank when it is forced to unmerge, are singularly unconcerned over the situation facing these same individuals when they discover that their institution no longer exists by virtue of a merger. Finally, where, as in the case of a number of merger suits, the banks successfully contend that a preliminary injunction should not be granted because divestiture relief is available in the event they lose, the argument that divestiture should not be decreed because of hardship and difficulty seems equally unattractive.¹⁰⁸

¹⁰⁵ See *supra* note 33. See also, *Hearings on Domestic Finance*, *supra* note 26, at 93-94, 100, 148-49, 2009-24.

¹⁰⁶ See *Hearings on Domestic Finance*, *supra* note 26, at 38-39, 1961.

¹⁰⁷ See *supra* note 40. This writer has found in the Senate and in the House hearings on S. 1698, a singular lack of reference to the possibility of harm to the public from a retention of a bank merger by those who said that divestiture would present problems. Such reference was made by some of those opposing the bill. *Hearings on Domestic Finance*, *supra* note 26, at 322, 541, 942, 945-7.

¹⁰⁸ See *Hearings on Domestic Finance*, *supra* note 26, at 170, 173, 179, 201, 230, 323, 331, 426, 729, 943 *et seq.*

Proponents of those bills would have it believed that application of the antitrust laws to consummated mergers was never contemplated. This simply is not so. The Sherman Act, of course, is most commonly applied to consummated transactions, and there is legislative history indicative of an awareness that the antitrust laws might be applied to consummated bank mergers as well.¹⁰⁹

Certainly there are problems inherent in bank merger divestiture, even difficult problems.¹¹⁰ But, it is submitted that these problems are no more difficult than those which arise when divestitures are ordered in other types of antitrust cases.¹¹¹ It would do well to recall that in two of the pending bank merger cases, divestiture decrees seemingly had been worked out,¹¹² and at least one of them appears to have been approved by the Federal Reserve Board.¹¹³

The truth is that just about any kind of divestiture and divorcement problem can be worked out by negotiations between the parties or by the court. One recalls the arguments and the chorus of cries that a forced sale of DuPont's stock interest in General Motors would depress the market value of the stock and cause other grave difficulties. The Supreme Court refused to accept this scare philosophy,¹¹⁴ and the divorcement appears to be progressing without undue difficulty.

¹⁰⁹ During the debate on the bank merger bill which became the 1960 Act, Senator Kefauver noted that a bank might be in a difficult position if 20 or 30 years later an Attorney General decided a merger was illegal and brought suit. Senator Javits replied, "We cannot avoid that possibility unless we make that definition even more inclusive than we now do." 105 CONG. REC. —. Congressman Multer during the House debates asserted that, "Under no circumstances is the enactment of this bill to be taken as an indication that the Congress acquiesces in any of the bank mergers that have heretofore occurred." 106 CONG. REC. 7259 (1960). In the First America case, *supra* note 34, a motion to dismiss had been denied.

¹¹⁰ See *Hearings on S. 1698, supra* note 2, at 55, 63 *et seq.*; *Hearings on Domestic Finance, supra* note 26, at 11, 223, 233-34, 381, 556.

¹¹¹ See *Hearings on Domestic Finance, supra* note 26, at 180, 948, 1545. In one recent bank merger case the Comptroller of the Currency intervened and opposed a motion for preliminary injunction on the ground that divestiture relief would be adequate if the merger were found to be invalid, and referred to formulation of divestiture plans in another pending case. *Id.* at 1648-49. In the First America case, *supra* note 34, after an unmerger the banks prospered. *Hearings on Domestic Finance, supra* note 26, at 106; United California Bank, 51 FED. RESERVE BULL. 1708, 1710 (1965).

¹¹² *Hearings on Domestic Finance, supra* note 26, at 180, 1648.

¹¹³ *Id.* at 688. The Federal Deposit Insurance Corporation also cooperated and thought divestiture could be effected. *Id.* at 820.

¹¹⁴ *United States v. DuPont & Co.*, 366 U.S. 316 (1961).

Similar problems in the *Paramount* case¹¹⁵ probably exceeded those involved in any of the pending bank merger cases.¹¹⁶

The argument that over 2,000 bank mergers would be open to attack if attack were not prohibited,¹¹⁷ not only has an air of utter unreality,¹¹⁸ but also raises at least two pertinent questions. Why should the banking industry be favored in this respect; secondly, why should these mergers have immunity if time has shown their effect to be harmful.

THE TEST OF EXPERIENCE

History is experience, and it is in the history of experience that a very strong case can be made for preserving the right of the Attorney General and of private persons to invoke the antitrust laws against bank mergers.

The record of the federal bank regulatory agencies¹¹⁹ regarding merger approvals has been sketched above. What is one to think when after the many years during which these agencies have had the authority to check bank concentration, the staff of one of such agencies finds it necessary to say: "To put the matter more explicitly, it has not been possible to calculate the impact of concentration on banking performance because there are too few nonconcentrated markets for adequate comparison."¹²⁰

Regulatory agencies have a tendency to assimilate the thinking of those whom they regulate. This has been particularly true of the bank regulatory agencies¹²¹ whose contacts with the public are minimal when compared with their contacts with the banks.¹²² Thus, some

¹¹⁵ *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948). The *Paramount* case involved such problems as the disposition of a \$30 million revolving fund, divestiture of hundreds of theatres in many cities, some theatres being held under lease and some held jointly with other persons, and creation, out of existing organizations separate production and distribution organizations and separate exhibition organizations.

¹¹⁶ *Ibid.*

¹¹⁷ See *Hearings on Domestic Finance*, *supra* note 26, at 51.

¹¹⁸ See, *id.* at 170, 173.

¹¹⁹ See *id.* at 2-4.

¹²⁰ *Research Into Banking Structure and Competition*, 50 FED. RESERVE BULL. 1391 (1964).

¹²¹ With respect to such agencies an unusual situation exists in that they need not come to Congress for an appropriation. See *Hearings on Domestic Finance*, *supra* note 26, at 54-55, 829-30.

¹²² Herman, *The Philadelphia Bank Merger Decision and Its Critics*, 1 NAT. BANK REV. 391, 404-405 (1964). See also, *Hearings on S. 1698*, *supra* note 2, at 156-157.

years ago when banks in Minnesota and New Jersey were charged by the Department of Justice to have violated the antitrust laws with price fixing, certain of the banking officials involved asserted that the Department should have left them alone since what they did was done by others and the bank regulatory agencies knew about those practices. At that time, the Comptroller of the Currency expressed resentment over the actions brought by the Department of Justice, and apparently still regards such offenses as minor.¹²³ It may be noted that the banks involved ultimately admitted the charges.

These regulatory agencies have rarely held public hearings on bank merger applications.¹²⁴ Generally, the agencies have regarded these applications as confidential and unavailable to one desiring to challenge a proposed bank merger. Only the Federal Reserve Board publishes their bank merger opinions with reasonable currency, and until recently some of the agencies did not publish them at all.¹²⁵ The reports of the Attorney General and of the other two bank regulatory agencies on the competitive aspects of a proposed merger have likewise been difficult to obtain.

Governor Robertson is the sole member of the Federal Reserve Board who has dissented in a substantial number of merger decisions, because he believed that adverse effects on competition were being disregarded or given little weight. Only occasionally has he been joined in such dissent by any other member. There are, of course, no dissents in decisions of the Comptroller of the Currency, and this writer is unaware of published dissents in bank merger decisions announced by the Federal Deposit Insurance Corporation.

Along with mergers, bank holding companies add to the picture of bank concentration in this country.¹²⁶ Concern over this problem led

¹²³ *Hearings on Domestic Finance*, *supra* note 26, at 69, 158-159, 183-184, 315, 637, 763-764. The banks appear to have preferred to rely upon the passivity of the regulatory agencies rather than on the author's admonitions in, Berle, *Banking Under the Anti-trust Laws*, 49 COL. L. REV. 589 (1949).

¹²⁴ During the years 1950-1958, the Comptroller of the Currency held no public hearings on bank merger applications. *Hearings Before Senate Committee on Banking and Currency on S. 1062*, 86th Cong., 1st Sess. 36 (1959). See also, *Hearings on Domestic Finance*, *supra* note 26, at 160, 177. The Comptroller of the Currency does not abide by that Act in such proceedings.

¹²⁵ *Hearings on Domestic Finance*, *supra* note 26, at 1036.

¹²⁶ See H.R. REP., 88TH CONG., 1ST SESS., BANK HOLDING COMPANIES, HOUSE COMMITTEE ON BANKING AND CURRENCY (Comm. Print 1963). As of that time, in 18 states, they held from 10% to more than 70% of all commercial bank deposits.

to the enactment of the Bank Holding Company Act of 1956,¹²⁷ which, among other things, required that bank acquisitions by such companies meet the approval of the antitrust laws to bank acquisitions by bank holding companies. But here again, while the writer believes this Act has served a useful purpose, because of gaps in the Act and the agency record it has not proved to be an adequate substitute for the antitrust laws.¹²⁸

The passage of the amended Bank Merger Act has had repercussions in related fields as well. The Bank Holding Company Act¹²⁹ had exempted certain types of holding companies from its purview. In order to remove such exemptions a bill was introduced in the House¹³⁰ during the second session of the 89th Congress and passed by that body. In the Senate, however, over the objections of the Attorney General,¹³¹ the Banking and Currency Committee added an amendment which made bank acquisitions by holding companies subject to the same provisions contained in the amended Bank Merger Act. Although the specious arguments advanced for the Bank Merger Act amendments were not applicable,¹³² nonetheless, the amendment was adopted by the Senate and agreed to by the House. Though it is now law,¹³³ this spate of bank merger legislation was not without some ironic attachments.¹³⁴

¹²⁷ 12 U.S.C. §§ 1841-48 (1964).

¹²⁸ H.R. REP., 88TH CONG., *supra* note 126, at 26. In 1965, it was asserted that the Board had approved 78% of the applications made under the Bank Holding Company Act. *Hearings on S. 1698*, *supra* note 2, at 151. In New York, the Superintendent of Banks recently approved several proposed bank holding company systems spearheaded by large New York City banks. For a dissent in a bank acquisition proceeding involving holding companies, see *Security Corporation*, 50 FED. RESERVE BULL. 1011 (1964).

¹²⁹ 12 U.S.C. §§ 1841-48 (1964).

¹³⁰ H.R. 7371, 89th Cong., 2d Sess. (1966).

¹³¹ 112 CONG. REC. 11793-94 (daily ed., June 6, 1966).

¹³² *Ibid.*

¹³³ P.L. 89-485 (June 1, 1966).

¹³⁴ Senator Robertson, Chairman of the Senate Banking and Currency Committee was supposed to be a shoe-in, in the Virginia Democratic primary. During the campaign a burst of newspaper publicity issued concerning the support he was receiving from New York banks who were urging their stockholders to thank him. See *Washington Post*, June 11, 1966 and *Washington Evening Star*, June 11 and 13, 1966. He was defeated in the primary. Apparently unknown to members of Congress pressing for this legislation was the holding of a Wisconsin district court, that, an action to bar the acquisition of a bank by a holding company could not be maintained in the absence of an appearance by the Attorney General. That case is presently on appeal.

With some exceptions, in many of their bank merger decisions the regulatory agencies have evidenced a philosophy which accepts the thesis that considerations of competition are satisfied if a merger will serve to neutralize the power of an existing competition between the large institutions. Also, although many of the agencies' opinions consider that the expansion of services possible through a merger justifies a diminution of competition,¹³⁵ this position has been taken with little apparent regard as to whether there were merger alternatives, or whether there was a real need for additional services in the community.¹³⁶ The active correspondent bank relationships, often praised in other respects, have received little attention from the regulatory agencies in merger cases.¹³⁷ The effect on the little businessman of the loss of a banking outlet is likewise rarely discussed.¹³⁸

The Federal banking agencies have gone far to nullify the Bank Merger Act of 1960¹³⁹ as well as to vitiate successful court action by the Department of Justice.¹⁴⁰ Is there any reason now to suppose that

¹³⁵ A survey of the merger operations of the bank regulatory agencies, referring to this emphasis on neutralization, concluded that, "if a merger promises to increase the range of services and if the market contains strong banks other than the ones involved in the merger, proposed" the three agencies are not likely to find a serious adverse effect on competition. PHILLIPS, *BANK MERGERS AND THE REGULATORY AGENCIES* 85 (1964). Some state regulatory authorities seem to have the same philosophy. See *Hearings on S. 1698*, *supra* note 2, at 206, 219; Comment, *supra* note 103, at 532.

According to one recent survey: "Market concentration, especially was found to be significantly associated with the pricing, output, and profits of banks—high concentration being associated with high loan rates, low rates on time and savings deposits, and high profits." See *Hearings on Domestic Finance*, *supra* note 26, at 1494.

¹³⁶ Governor Robertson of the Federal Reserve Board has called attention to this phenomenon in a number of his dissents in merger decisions of the Board.

¹³⁷ *Hearings on S. 1698*, *supra* note 2, at 159; *Hearings on Domestic Finance*, *supra* note 26, at 421.

¹³⁸ See Comment, *supra* note 103.

¹³⁹ Thus, when the Federal Reserve Board recently approved an acquisition by the largest bank in North Carolina, with about 22 per cent of the total deposits and 11 per cent of the bank offices in the state, and over 30 per cent of the banking offices and about 54 per cent of the commercial deposits in a two county area, a dissenting member of the Board felt compelled to say: "By approving this application the Board has, in my judgment, taken one more step toward making a virtual nullity of the Bank Merger Act of 1960." *Wachovia Bank and Trust Company*, 51 FED. RESERVE BULL. 671, 673 (1965).

¹⁴⁰ In California, the Federal Reserve Board recently has permitted a merger by the successor of a bank whose merger activities had been halted some years before in litigation. See *United California Bank*, 51 FED. RESERVE BULL. 1708, 1710 (1965). As to Philadelphia, see *Provident Tradesman's Bank and Trust Company*, 50 FED. RESERVE

they would act differently under any of the bills proposed in the 89th Congress.¹⁴¹ A member of the Federal Reserve Board has asserted that "with three competing agencies, a race of laxity is almost inescapable." And a representative of the smaller bank has said that, "The real 'teeth' in the Bank Merger Act of 1960 is the fact that the Department of Justice has the power to bring legal action."¹⁴² It is this power that is now being threatened.

CONCLUSION

The events preceding new bank mergers law present a dilemma for the Department of Justice. The Attorney General's shift of position during that period was accompanied by a strained attempt on his part to say that a merger bill which provided for a list of factors to be considered by the agencies and by the courts did not really change existing law. However, in his letter of January 5, 1966 to Congressman Reuss he had objected strenuously to one part¹⁴³ of the bill, which in spite of his protest remained. As to that part the Attorney General asserted that it would make a substantial change in the law.

In its eagerness to win cases which are pending in the courts the Department of Justice has, at times, advanced a proposition which may help it win a particular case, but which jeopardizes its position on much broader matters. It takes the position in the three pending bank merger cases, that Public Law No. 89-656 makes no substantial change, it not only must face the inconsistent statement of the Attorney General, but also encourages defendants in non-bank merger suits to invoke the tests of the new bank merger law. If the Depart-

BULL. 1003, 1006 (1965), where Governor Mills dissents: "The trend toward concentration of banking resources among a few large institutions in the City of Philadelphia has reached a point where further mergers should not be permitted unless warranted by compelling reasons not present in the instant case."

¹⁴¹ *Hearings on Domestic Finance*, *supra* note 26, at 303. See also *Hearings on S. 1698*, *supra* note 2, at 182, and *Hearings on Domestic Finance*, *supra* at 199. It has been noted as well that an approval of a proposed merger by an agency may be an inducing cause for a subsequent approval of another merger in the same area by another regulatory agency. See HALL AND PHILLIPS, *BANK MERGERS AND THE REGULATORY AGENCIES* 49 (1964). This is the other side of the coin from where a prospective merger-minded bank decides which banking system to join on the basis of its opinion as to which agency will be more receptive to a merger proposal.

¹⁴² *Hearings on S. 1698*, *supra* note 2, at 182.

¹⁴³ See the second clause quoted in note 89 *supra*.

ment agrees that the Law makes substantial changes in the antitrust test it embarks on uncharted sea.¹⁴⁴

The unique provision for intervention by a bank regulatory agency in a suit brought under the new law insures that any effort by the Department of Justice to emphasize the competitive factors will be counterbalanced by an emphasis on the so-called banking factors by such agencies. The Comptroller of the Currency who, with only partial success in the past, has made numerous attempts to intervene and may be counted upon to intervene in any case emanating from his office. It is likely, as well, that if a bank merger is approved by the Federal Reserve Board or the Federal Deposit Corporation and attacked by the Department of Justice intervention will be requested. Since these agencies in the past have often differed with the Attorney General on the competitive factors in the ensuing litigation, we may well witness government agencies taking different positions as to these factors.¹⁴⁵

This writer believes that the bank regulatory agencies will continue to approve the majority of the bank merger applications that are submitted; that more mergers will be approved on the grounds of an alleged benefit to the economy as a whole and to competition among big banks despite any adverse effect on the community in which the institutions are located; that the Attorney General will bring fewer anti-merger suits; and that bank concentration will continue to grow.

Bank mergers present no less a threat to our competitive society than industrial mergers. History has demonstrated that it is the application of the antitrust laws by the Department of Justice and not the application by bank regulatory agencies of special laws that has served

¹⁴⁴ In the three cases still pending at the time of this writing, the Attorney General has taken the position that the law has not been substantially changed. The Justice Department has instituted three bank merger cases since the passage of the Bank Merger Act. One was dismissed when the merger was abandoned. In another, a motion to dismiss has been made on the ground that the suit should have been brought under the Bank Merger Act rather than under Section 7 of the Clayton Act. The third is still in its early stages. In the First Nat'l. Bank case, *supra* note 39, the Attorney General is attempting to save the suit from the nullification provisions of the amendment by relying upon a count based upon Section 2 of the Sherman Act—the monopoly section.

¹⁴⁵ These agencies appear not to have recognized any particular expertise on the part of the Justice Department regarding the competitive issue. The Comptroller of the Currency, at the time of this writing, has intervened in two suits brought by the Attorney General and is attempting to intervene in another such action where one of the other two regulatory agencies had approved the merger in question.

as any kind of check on mergers and ensuing bank concentration. Only when such application affected the very large financial institutions was an attack mounted to shelve the antitrust laws as to bank mergers and to kill pending litigation under those laws. The new law crowns their efforts with success.

It is submitted that we are entitled to more from the Congress and the executive branch of the government which made this debacle possible. Unhappily, we seem to have reached the point in the history of our antitrust laws where it seems easier to exempt certain industries from these laws rather than to apply them indiscriminately.